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Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-264–08 OF 2017
UMI KALTHUM, VERNON ONG AND SURAYA OTHMAN JJCA
18 JANUARY 2019

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Civil Procedure — Jurisdiction — Matters relating to Islamic religion — Appellant filed originating summons for declaration that appellant was not Muslim — Whether Guardianship of Infants Act 1961 applicable — Whether appellant's application misconceived in law and in fact — Whether civil court or Shariah Court had jurisdiction — Guardianship of Infants Act 1961 s 1(3)

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Islamic Law — Apostasy — Jurisdiction — Appellant filed originating summons for declaration that appellant was not Muslim — Whether Guardianship of Infants Act 1961 applicable — Whether appellant's application misconceived in law and in fact — Whether civil court or Shariah Court had jurisdiction — Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2 & 61(3)(b)(x)

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The appellant had filed an originating summons at the High Court for, inter alia, the following declarations: (a) the appellant was an illegitimate person and that one Yap Ah Mooi ('Mdm Yap'), a Buddhist was her natural mother; (b) the word 'parent' in para (b) of the interpretation of 'Muslim' in s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the 2003 Enactment') did not include the putative father of an illegitimate child; and (c) the appellant was not a person professing the religion of Islam. The learned judicial commissioner ('JC') found that the appellant's father, En Ibrahim and the appellant's mother, Mdm Yap were married and that the appellant was a child of the marriage. Further, the learned JC held that the question of the validity of their marriage fell within the jurisdiction of the Shariah Court and that the appellant was a Muslim at birth. The learned JC applied s 61(3)(b)(x) of the 2003 Enactment in ruling that the Shariah Court had the jurisdiction to decide on the question of whether the appellant was no longer a Muslim. Dissatisfied with the decision, the appellant's filed the present appeal. The appellant's case was mounted on the premise that the appellant was an illegitimate child born to a Buddhist mother. Section 1(3) of the Guardianship of Infants Act 1961 ('the Act') only excluded the application of the Act to any illegitimate child, whose mother was a Muslim. Since Mdm Yap was not a Muslim, the Act applied to both the appellant and her mother. On the other hand, the respondents submitted that the Act did not apply because the appellant was no longer an infant.

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Held, dismissing the appellant's appeal with costs and affirming the decision of the learned JC:

(1) The Act related essentially to the question of guardianship and custody of an infant, therefore, the question of the applicability of the Act in the present case was a misnomer because the appellant was no longer an infant. Further, the court did not see how in the particular circumstances of the present case and in what manner the question of guardianship of infants under the Act was relevant to the question of whether the appellant was not a person professing the religion of Islam. Therefore, the appellant's application was misconceived in law and in fact (see para 10).

(2) The court was not persuaded that the findings of the learned JC that En Ibrahim and Mdm Yap were married, that the appellant was a child of the marriage and that the appellant was a Muslim, was plainly wrong. The court agreed with the submission of the second respondent that the appellant was in law and in fact a Muslim pursuant to s 2 of the 2003 Enactment. This was especially clear in the light of the undisputed fact that the appellant's father, En Ibrahim was a Malay and a Muslim (see para 12).

(3) Prayer (ii) of the appellant's originating summons was for a declaration that the appellant was not a person professing the religion of Islam. Given the findings that the appellant was a Muslim, the effect of the declaration sought was to enable the appellant to renounce Islam as her religion; which in effect amounted to a declaration that the appellant was no longer a Muslim. The jurisdiction to determine this issue was vested in the Shariah Court pursuant to s 61(3)(b)(x) of the 2003 Enactment and not the civil court (art 121(1A) of the Federal Constitution). The court further held that the court was bound by the Federal Court's decision in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 (see paras 13–14).

[Bahasa Malaysia summary

Perayu telah memfailkan saman pemula di Mahkamah Tinggi untuk, antara lain, perisytiharan berikut: (a) perayu adalah orang yang tidak sah taraf dan Yap Ah Mooi ('Mdm Yap'), seorang yang beragama Buddha adalah ibu kandungnya; (b) perkataan 'ibu bapa' dalam perenggan (b) tafsiran 'orang Islam' dalam Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('Enakmen 2003') tidak termasuk bapa putatif kepada anak tidak sah taraf; dan (c) perayu bukanlah orang yang menganut agama Islam. Pesuruhjaya kehakiman ('PK') yang bijaksana mendapati bahawa bapa perayu, En Ibrahim dan ibu perayu, Mdm Yap telah berkahwin dan perayu adalah anak hasil daripada perkahwinan tersebut. Selain itu, PK yang bijaksana berpendapat bahawa persoalan tentang kesahihan perkahwinan mereka tertakluk di dalam bidang kuasa Mahkamah Syariah dan perayu adalah seorang Islam ketika

dilahirkan. Pesuruhjaya kehakiman yang bijaksana mengguna pakai s 61(3)(b)(x) Enakmen 2003 dalam memutuskan bahawa Mahkamah Syariah mempunyai bidang kuasa untuk memutuskan persoalan sama ada perayu bukan lagi seorang muslim. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Kes perayu telah disandarkan di atas hujahan bahawa perayu adalah anak tidak sah taraf yang dilahirkan kepada ibu yang beragama Buddha. Seksyen 1(3) Akta Penjagaan Kanak-kanak 1961 ('Akta') hanya mengecualikan pemakaian Akta kepada mana-mana anak tidak sah taraf, yang ibunya seorang Muslim. Memandangkan Mdm Yap bukanlah seorang Muslim, Akta tersebut terpakai kepada kedua-dua perayu dan ibunya. Sebaliknya, responden berhujah bahawa Akta tidak terpakai kerana perayu bukan lagi seorang kanak-kanak.

Diputuskan, menolak rayuan perayu dengan kos dan mengesahkan keputusan PK yang bijaksana:

(1) Akta tersebut pada dasarnya berkaitan dengan persoalan penjagaan dan hak jagaan kanak-kanak, oleh itu, persoalan tentang pemakaian Akta tersebut dalam kes semasa adalah tidak tepat kerana perayu bukan lagi seorang kanak-kanak. Tambahan pula, mahkamah tidak dapat melihat bagaimana dalam keadaan tertentu dalam kes ini dan dengan cara bagaimana persoalan penjagaan kanak-kanak di bawah Akta tersebut relevan dengan persoalan sama ada perayu bukanlah seorang yang menganut agama Islam. Oleh itu, permohonan perayu adalah salah tanggap dalam undang-undang dan fakta (lihat perenggan 10).

(2) Mahkamah tidak mempercayai bahawa penemuan PK yang bijaksana bahawa En Ibrahim dan Mdm Yap telah berkahwin, bahawa perayu adalah anak hasil daripada perkahwinan tersebut dan perayu adalah seorang muslim, adalah nyata salah. Mahkamah bersetuju dengan hujahan responden kedua bahawa perayu, di dalam undang-undang dan fakta, adalah seorang Muslim menurut s 2 Enakmen 2003. Ini jelas sekali berdasarkan fakta yang tidak dipertikaikan bahawa bapa perayu, En Ibrahim adalah seorang Melayu dan seorang Muslim (lihat perenggan 12).

(3) Permohonan (ii) saman pemula perayu adalah untuk perisytiharan bahawa perayu bukanlah seorang yang menganut agama Islam. Berdasarkan penemuan bahawa perayu adalah seorang Muslim, kesan perisytiharan yang dipohon adalah untuk membolehkan perayu untuk meninggalkan Islam sebagai agamanya; yang pada hakikatnya terjumlah kepada perisytiharan bahawa perayu bukan lagi seorang Muslim. Bidang kuasa untuk menentukan isu ini terletak pada Mahkamah Syariah menurut s 61(3)(b)(x) Enakmen 2003 dan bukannya mahkamah sivil (perkara 121(1A) Perlembagaan Persekutuan). Mahkamah selanjutnya memutuskan bahawa mahkamah terikat dengan keputusan Mahkamah

Persekutuan di dalam kes *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 (lihat perenggan 13–14).]

Notes

For a case on jurisdiction, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 668.

For cases on matters relating to Islamic religion, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6322–6327.

Cases referred to

In the estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid [1998] 4 MLJ 623, HC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585; [2007] 3 CLJ 557, FC (folld)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2(B), 61(3)(b)(x)

Federal Constitution art 121(1A), Ninth Schedule, List II, Item 1

Guardianship of Infants Act 1961 s 1(3)

Appeal from: Application for Originating Summons No 24–1314–11 of 2015 (High Court, Shah Alam)

Aston Paiva (Michael Cheah Ern Tien with him) (Amerbon) for the appellant.

Nik Suhaimi bin Nik Sulaiman (Mohd Syahrizal Syah bin Zakaria and Muhammad Haziq bin Hashim with him) (Selangor State Legal Advisor's Office) for the first respondent.

Zainul Rijal bin Abu Bakar (Abdul Rahim bin Sinwan, Muhammad Zaki bin Sukery, Muhammad Akmal bin Abu Bakar and Muhamad Hisham bin Marzuki with him) (Zainul Rijal Talha & Amir) for the second respondent.

Raja Noor Syuhada bt Raja Khairuddin (Tan Law Practice) watching brief for Women's Aid Organisation, All Women's Aid Action Society Malaysia, Persatuan Kesedaran Komuniti Selangor (Empower), Sisters in Islam (SIS), Association of Women Lawyers (AWL), Perak Women for Women (PWW), Women's Centre for Change Penang (WCC), Persatuan Sahabat Wanita Selangor, Sabah Women's Action – Resource Group (SAWO) and Tenaganita.

Philip TN Koh (Mah Kamariyah & Philip Koh) watching brief for Majlis Perundangan Malaysia Agama Buddha, Kristian, Hindu, Sikh dan Tao.

Mansur bin Saad watching brief for Suhakam.

Vernon Ong JCA:

INTRODUCTION

[1] In 2015, the plaintiff filed an originating summons at the Shah Alam High Court seeking the following declarations:

(i) a declaration that the plaintiff is an illegitimate person and that one Yap Ah Mooi a Buddhist was her natural mother;

(ii) a declaration that the word 'parents' in para (b) of the interpretation of 'Muslim' in s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the 2003 Enactment') does not include the putative father of an illegitimate child; and

(iii) a declaration that the plaintiff is not a person professing the religion of Islam, and that: (a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, Item 1 of the Federal Constitution are of no effect on, and are not applicable to, the plaintiff; and (b) all Syariah Courts within the State of Selangor do not have jurisdiction over the plaintiff.

[2] On 22 June 2017, the learned judicial commissioner ('JC') dismissed the plaintiff's application with no order as to costs. This is the plaintiff's appeal against the said decision. On 25 April 2018 we dismissed the plaintiff's appeal and affirmed the decision of the learned JC after hearing of submissions. In this judgment the parties shall be referred to as they were in the High Court.

SALIENT FACTS

[3] The salient facts insofar as they relate to this case and which eventually led to the plaintiff's originating summons may be summarised as follows:

(i) according to the plaintiff's birth certificate the plaintiff was born on 19 November 1981 at the Chinese Maternity Hospital Kuala Lumpur to one Yap Ah Mooi ('Mdm Yap') and one Ibrahim bin Hassan ('En Ibrahim');

(ii) Mdm Yap's residential address was recorded as 38B, Jalan Pasar, Pudu Kuala Lumpur;

(iii) En Ibrahim's application form for a new identity card for himself ('IC') on 22 June 1982 carried the same address;

(iv) on 13 January 1994, En Ibrahim, as the father of the plaintiff, submitted an application for an IC for the plaintiff where the plaintiff's religion is

declared as 'Islam' and residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Kuala Lumpur. Mdm Yap's 'keturunan' was declared to be 'Melayu';

(v) on 14 January 1995, En Ibrahim submitted his own application for an IC wherein he declared that his residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Cheras, Kuala Lumpur, his religion as 'Islam' and his marital status as 'Berkahwin';

(vi) on 14 February 1995, Mdm Yap in her application for her IC declared that her residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Cheras, Kuala Lumpur, her 'keturunan' as 'Cina', religion as 'Buddha', and her marital status as 'Berkahwin';

(vii) on 8 October 2008, Mdm Yap affirmed a statutory declaration ('SD') declaring that the plaintiff is her daughter, that she and En Ibrahim are the plaintiff's parents, that she and En Ibrahim were not married, and lastly that the plaintiff was not brought up as a Muslim; and

(viii) Mdm Yap passed away on 7 February 2009.

FINDINGS OF THE HIGH COURT

[4] According to the learned JC, the question of whether the plaintiff is a Muslim is dependent on whether En Ibrahim and Mdm Yap were married. After considering the affidavit evidence and in particular the declarations made by En Ibrahim (see para 3(v) above) and Mdm Yap (see para 3(vi) above) of their marital status, the learned JC found that En Ibrahim and Mdm Yap were married and that the plaintiff is a child of the marriage. Further, the learned JC opined that the question of the validity of their marriage fell within the jurisdiction of the Syariah Court (para 1 of List II — State List, Ninth Schedule to the Federal Constitution; *In the estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid* [1998] 4 MLJ 623).

[5] The learned JC discounted the affidavit of Chan Sew Fan which asserted that from 1985 to 1990 Mdm Yap who professed Buddhism had raised the plaintiff as a Buddhist in Taman Maluri, Kuala Lumpur. That assertion went against the undisputed fact that: (i) En Ibrahim is a Muslim; (ii) the plaintiff's religion was declared as Islam in the application for the plaintiff's IC in 1994; (iii) the fact that En Ibrahim and Mdm Yap stayed together at the Jalan Pasar, Pudu address since 1981 until 1985; (iv) En Ibrahim and Mdm Yap lived together around 1994–1995 at the Taman Maju Jaya, Cheras address as they each had declared their marital status as 'Berkahwin' in their respective IC application forms. As such, the learned JC found that the plaintiff is a Muslim at birth.

[6] Consequently, the learned JC applied s 61(3)(b)(x) of the 2003 Enactment in ruling that the Syariah Court had the jurisdiction to decide on the question of whether the plaintiff was no longer a Muslim.

SUBMISSION OF PARTIES

[7] The plaintiff's case was mounted on the premise that the plaintiff is an illegitimate child born to a Buddhist mother. Section 1(3) of the Guardianship of Infants Act 1961 ('the GIA 1961') only excludes the application of the GIA 1961 to any illegitimate child, whose mother is a Muslim. Since Mdm Yap was not a Muslim, the GIA 1961 applies to both the plaintiff and her mother. En Ibrahim's declarations in his IC application form has no evidentiary value.

[8] Learned counsel for the plaintiff also argued that the fact of their declarations of their marital status 'Berkahwin' did not prove the existence of a valid Muslim marriage. The truth of the contents of the written applications for ICs were not proven by the defendant and intervener, the said contents did not have any evidentiary value and should be disregarded for being irrelevant. As such, Mdm Yap's version as per her SD should have been accepted by the learned JC.

[9] Learned counsel for the defendant and the intervener respectively argued in support of the learned JC's decision. The GIA 1961 did not apply because the plaintiff is no longer an infant. The plaintiff's status is based on her IC and documents which show that she is a born Muslim and not a revert or a convert. If the plaintiff contends that she is not a Muslim, then she should have gone to the Syariah Court to seek a declaration under s 61(3)(b)(x) of the 2003 Enactment. The records show that the plaintiff is a Malay and a Muslim. Learned counsel for the intervener also argued that the plaintiff is in law and in fact a Muslim pursuant to s 2 of the 2003 Enactment. Therefore, it was submitted that the decision of *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557 (FC) is binding and the civil court has no jurisdiction to hear the matter.

DECISION

[10] The GIA 1961 relates essentially to the question of guardianship and custody of an infant. In our considered view the question of the applicability of the GIA 1961 is a misnomer. We say this because the plaintiff is no longer an infant. We also do not see how in the particular circumstances of this case in what manner the question of guardianship of infants under the GIA 1961 is relevant to the question of whether the plaintiff is not a person professing the religion of Islam (see prayer (iii) in para [1] above). Therefore, in our considered view the plaintiff's application is misconceived in law and in fact.

[11] In this connection, we had also taken note of the fact that in 2009 the plaintiff had filed an action for judicial review (Guaman R4–25–216 Tahun 2009) citing the Ketua Pengarah Pendaftaran Negara and Kerajaan Malaysia. In the 2009 action, the plaintiff sought, inter alia, for an order to change her name from Rosliza bt Ibrahim to Sek Lai Peng and for the word 'Islam' to be expunged from her IC. The plaintiff's application was dismissed by the High Court and her appeal to the Court of Appeal was dismissed.

[12] We had carefully considered the evidence on the appeal record and the grounds of the learned JC's written judgment. We were not persuaded that the findings of the learned JC that En. Ibrahim and Mdm Yap were married, that the plaintiff is a child of the marriage and that the plaintiff is a Muslim, is plainly wrong. We also agreed with the submission of learned counsel for the intervener that the plaintiff is in law and in fact a Muslim pursuant to s 2 of the 2003 Enactment which provides that a 'Muslim' means 'a person *either or both of whose parents* were at the time of the person's birth, a Muslim'; this is especially clear in the light of the undisputed fact that the plaintiff's father En Ibrahim is a Malay and a Muslim.

[13] At any rate, we also observed that prayer (ii) of the plaintiff's originating summons is for a declaration that the plaintiff is not a person professing the religion of Islam. Given the findings that the plaintiff is a Muslim, the effect of the declaration sought is to enable the plaintiff to renounce Islam as her religion; which in effect amounts to a declaration that the plaintiff is no longer a Muslim. The jurisdiction to determine this issue is vested in the Syariah Court pursuant to s 61(3)(b)(x) of the 2003 Enactment. It is therefore plain that the plaintiff's avenue for the declaration sought is within the jurisdiction of the Syariah Court and not the civil court (art 121(1A) of the Federal Constitution).

[14] For the foregoing reasons we did not think that there was any constitutional issue involved in this case. Whilst we empathise with the plaintiff's plight, this court is nevertheless bound by the Federal Court's decision in *Lina Joy*. The civil court is not seized with jurisdiction to adjudicate on the matter. It falls within the province of the Syariah Court. Accordingly, the plaintiff's appeal was dismissed with no order as to costs.

Appellant's appeal dismissed with costs; decision of learned JC affirmed.

Reported by Dzulqarnain Ab Fatar